CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 732

THE UNITED STATES OF AMERICA, APPELLANT

vs.

JAMES E. FARRAR

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

FILED MARCH 12, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 732

THE UNITED STATES OF AMERICA, APPELLANT

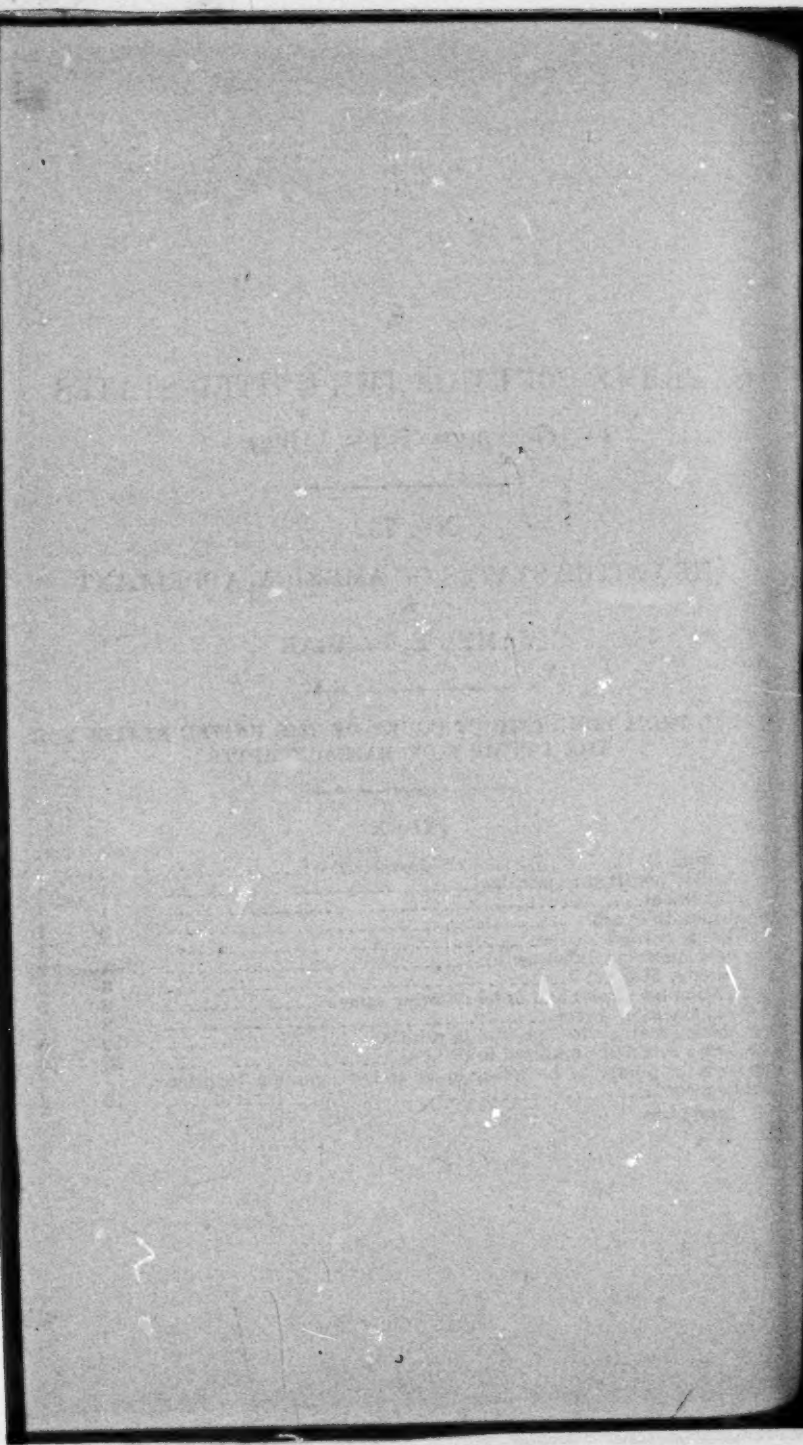
vs.

JAMES E. FARRAR

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

INDEX

	Original	Print
Record from D. C. U. S., District of Massachusetts	1	1
Caption [omitted in printing]	1	1
Indictment	1	1
Motion to quash	2	1
Minute entries	2	1
Order quashing indictment	2-A	2
Opinion, Morton, J.	3	2
Petition for appeal and order allowing same	8	5
Assignment of errors	8	5
Citation and service [omitted in printing]	10	6
Clerk's certificate [omitted in printing]	12	6
Statement of points to be relied upon and designation to print entire record	13	6



1 [Caption omitted.]

In United States District Court, District of Massachusetts

No. 9390, Criminal Docket

UNITED STATES OF AMERICA, BY INDICTMENT

v.

JAMES E. FARRAR

Indictment

The jurors for the United States of America, within and for the district of Massachusetts, upon their oath, present that James E. Farrar, of Watertown, in the district of Massachusetts, on or about the twenty-eighth day of September in the year one thousand nine hundred and twenty-nine, at Cambridge in said district, did unlawfully and knowingly purchase from one Frank Rotondo of Medford in said district intoxicating liquor containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes as defined in the act of Congress of October 28, 1919, commonly known as the national prohibition act, to wit, two pints, more or less, thereof.

This indictment is presented by the grand jury at the present December Term of this Court, A. D. 1929.

2 In United States District Court

Motion to Quash Indictment

Filed February 13, 1930

Now comes the defendant in the above entitled cause, and moves this honorable court that the indictment returned against him by the grand jury, to the effect that he unlawfully and knowingly purchased intoxicating liquor from one Frank Rotondo, be quashed on the ground that said indictment, the allegations of which the defendant does not admit to be true, does not constitute an offense indictable under the laws of the United States.

By his attorney.

JAMES A. CRESSWELL.

In United States District Court

Minute entries

On the 24th day of said February, said cause is set down for hearing on the aforementioned motion to quash indictment and is

fully heard by the court, the Honorable James M. Morton, jr., district judge, sitting, and on the 7th day of March, A. D. 1930, an opinion of the court is announced.

Thereupon, to wit, March 7, 1930, it is considered by the court, the Honorable James M. Morton, jr., district judge, sitting as aforesaid, that the indictment in this cause be and the same is hereby quashed.

2A In United States District Court, District of Massachusetts

Criminal No. 9390

UNITED STATES OF AMERICA

vs.

JAMES E. FARRAR

Order quashing indictment, Mar. 7, 1930

MORTON, J.:

Ordered, that for reasons stated in the opinion filed herewith, this indictment is quashed.

By the court.

JAMES S. ALLEN, *Clerk.*

7 Mar., 1930. J. M. M., jr.

2B [Certificate to foregoing paper omitted in printing.]

3 In United States District Court

Opinion, March 7, 1930

MORTON J.: This indictment charges in the simplest and most direct language that the defendant committed a crime by knowingly and unlawfully purchasing two pints of intoxicating liquor from one Rotondo. There is no charge of illegal possession. The defendant has moved to quash on the ground that the act charged is not criminal.

The case presents a question of statutory construction, whether the purchase of liquor is criminal under the national prohibition act. The basic prohibitory section, around which the act is built does not prohibit purchases. "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act," etc. (section 3.) The Government relies on section 6, "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner to do so," etc. The defendant contends that this sec-

ion, which is one of a group relating to permittees and privileged persons, applies only to them, and does not touch purchases by the general public.

The case is said to be the first of its kind under the present statute, and the question to be new. It is true that there appears to be no direct decision whether the buyer of liquor is guilty of an offense under the national prohibition act. Two circuit courts of appeal, however, have referred to the question, and stated explicitly that in their opinion the purchase of liquor by the general public is not criminal.

"We concede at once that merely as buyer he was not a party to the scheme in any criminal sense." L. Hand, J., Becher vs. U. S., 5 F. 2nd 45 at 50, C. C. A. 2nd.

"It is conceded that under the eighteenth amendment and the Volste'd Act passed to carry it into effect the purchase of liquor is not made an offense. It follows that the purchase as such does not subject the buyer to punishment. This is perfectly clear from the act itself. Not only did Congress carefully exclude the purchaser from the penal provisions of the act as originally passed, but has taken no step to extend its provisions to the purchaser in the ten years of legislation which have since intervened. That the intention and purpose of Congress is in harmony with the act as drawn is thus made perfectly manifest." Thomson, J., Norris vs. U. S., 34 F. 2nd 839 at 841.

There is also a statement by the Supreme Court, which, though less categorical, amounts to the same thing, in United States vs. Katz, 271 U. S. 354, where it is said: "Of the thirty-nine sections in Title II of the act, which deals with national prohibition, more than half, including the seven sections which precede section 10, contain provisions authorizing or regulating the manufacture, sale, transportation, or use of intoxicating liquor for nonbeverage purposes. These provisions, read together, clearly indicate a statutory plan or scheme to regulate the disposition of alcoholic liquor not prohibited by the eighteenth amendment, in such manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, use, or possess intoxicating liquors under the eighteenth amendment and the provision of section 3 of the act, already quoted." Stone, J., p. 361–362. The sections thus discussed are copied in a footnote to the opinion; they include section 6 on which the Government relies in this case. The last sentence above quoted is an explicit dictum that section 6 relates only to permittees. In the Katz case general words which, taken literally, included the defendant, "*No person* (italics mine) shall manufacture, purchase for sale, sell," etc. (section 10) were held to be cut down by the context and the tenor of the act as a whole, and to apply only to permittees. The language of section 6 is similar: "No one shall," etc.; both sections relate to the

same subject, control of permitted liquor. The decision comes close to being a decisive authority against the Government's contention.

Even if my own opinion was to the contrary, which it is not, I should hardly feel at liberty to disregard such weighty expressions, especially when the same view seems to have been uniformly held by prosecuting officers, and by the public at large, for more than ten years, and with respect to a statute intimately touching everyday life. The popular construction of such a statute over a long period of time was held to be highly significant as to its true meaning in State vs. Teahan, 50 Conn. 92, and State vs. Rand, 51 N. H. 361. In the latter case it was said, "That such a prosecution is unprecedented in this State, shows very strongly what has been understood to be the law upon the subject." Smith, J. Moreover, the statute under consideration belongs to a class of which many examples are to be found in our legislation. While the language of them differs, all follow similar lines. All have been similarly construed. In Lott vs. United States, 205 F. R. 28, C. C. A. 9th, the court said, "It is uniformly held
6 that statutes prohibiting the sale of intoxicating liquors are directed against the act of selling only, and that the offense is committed only by the vendor or some one who aids him in selling, and that the purchaser and those who aid him in the purchase are not guilty of aiding or abetting in the commission of the offense." Gilbert, J., at p. 29. "We know of no law that prohibits the purchase of liquor." Owen, J. Reed vs. State, 24 L. R. A. ns 268 at 274.

It seems clear that if Congress had intended to introduce such a revolutionary change in existing methods of dealing with the liquor problem as making the ordinary buyer criminally liable, it would have said so in no uncertain terms (see Shaw, C. J., Com. vs. Willard, 22 Pick. 476, 479, and Norris vs. U. S., ubi supra); and it would have expressly prescribed the penalties for buying, as it did for selling, in far more definite language than that on which the Government here relies, viz.: "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined," (section 29), etc., which appears to relate to permittees. There are strong reasons why permittees should be penalized for abuse of the privileges granted them.

As I construe the indictment it does not charge the defendant with aiding and abetting a sale of liquor. Even if it does, no crime would be charged. It has been repeatedly held that the buyer was not, ipso facto, an aider and abetter of the seller; and the Government counsel conceded at the argument that no other relation between the defendant and Rotondo existed in this case. (See Norris vs. U. S. supra; Lott vs. U. S., 46 L. R. A. ns 409, note citing authorities; State vs. Teahan, supra; State vs. Cullins, 24 L. R. A. 212.) The act of April 30, 1789, as amended (18 U. S. C. A. sec. 251) requires both concealment and failure to disclose. Under it some affirmative

7 act toward the concealment of the felony is necessary. Mere silence after knowledge of the commission of the crime is not sufficient. The allegations of the indictment do not bring it within this statute. (See Robinson vs. State, 57 Ind. 113; Com. vs. Tuckerman, 10 Gray. 173.)

Indictment quashed.

8 In United States District Court

Petition for Appeal from Order Quashing Indictment and Order Allowing Same

Filed March 8, 1930

To the JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS:

In the case hereinabove named the United States of America, deeming the court to be in error in the order and decree made and entered herein on the seventh day of March, in the year one thousand nine hundred and thirty, hereby appeals from said order and decree, and it therefore prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and decree was made, after due authentication, may be sent to the United States Supreme Court.

UNITED STATES OF AMERICA
(By its attorneys),
FREDERICK H. TARR,
United States Attorney,
By ELIHU D. STONE,
Assistant United States Attorney.

Assented to:

JAMES A. CRESSWELL,
Attorney for Defendant.

8 March, 1930. Appeal allowed.

JAMES M. MORTON, Jr.,
U. S. District Judge.

In United States District Court

Assignment of errors

Filed March 8, 1930

And now on this 8th day of March, in the year one thousand nine hundred and thirty, comes the United States of America and in connection with its appeal makes the following assignment of errors, namely:

1. The court erred in allowing the motion of the defendant in the above entitled case.

2. The court erred in decreeing that the indictment in said case be quashed.

9 3. The court erred in ruling that the provision contained in section 6, Title II, of the national prohibition act, which is in part as follows, to wit: "No one shall * * * purchase * * * any liquor without first obtaining a permit from the commissioner so to do," etc., has no application to the case at bar.

4. The court erred in ruling that said provision of said section 6 is limited in its application to persons eligible to be permittees under said national prohibtion act.

5. The court erred in ruling that said provision of section 6 is limited in its application to permittees.

6. The court erred in ruling that said provision of section 6 does not relate to the general public.

7. The court erred in ruling that the provision contained in section 29, Title II, of said national prohibition act to the effect that any one who "violates the provisions of this title, for which offense a special penalty is not prescribed, shall be fined," etc., relates to permittees.

8. The court erred in ruling that the penal provisions of section 29, Title II, of said national prohibition act have no application to the case at bar.

UNITED STATES OF AMERICA
(By its attorneys),
FREDERICK H. TARR,
United States Attorney,
By HAVEN PARKER,
Assistant United States Attorney.

10 [Citation in usual form, showing service on James A. Creswell, omitted in printing.]

12 [Clerk's certificate to foregoing transcript omitted in printing.]

13 In Supreme Court of the United States

Statement of points upon which the appellant relies and designation to print entire record

Filed Mar. 13, 1930.

STATEMENT

I

Pursuant to Rule 13 of this court, appellant specifies the following points upon which it intends to rely in the above-entitled cause:

A. It is an offense under the national prohibition act to purchase intoxicating liquor except as authorized by that act.

B. The provision of section 6, Title II, of the national prohibition act, that "No person shall * * * purchase * * * any liquor without first obtaining a permit from the commissioner so to do," is not confined to persons to whom permits to purchase liquor may lawfully issue, but applies to all persons.

C. The provision of section 29 of Title II, imposing a penalty upon "Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed," applies to all persons who purchase liquor, except as authorized by the act.

II

The entire record as filed should be printed.

WILLIAM D. MITCHELL,
Attorney General.
G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE,
Attorney.

MARCH, 1930.

(File endorsement omitted.)
Filed Mar. 18, 1930.

[Indorsement on cover:] File No. 34863. Massachusetts D. C., U. S. Term No. 732. The United States of America, appellant, vs. James E. Farrar. Filed March 12, 1930. File No. 34863.

U. S. GOVERNMENT PRINTING OFFICE, 1930.